STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

ALBERT CHAN, Charging Party, v. SEIU LOCAL 790, Respondent.	Case No. SF-CO-128-M PERB Decision No. 1892-M March 15, 2007

Appearance: Albert Chan, on his own behalf.

Before Shek, McKeag and Neuwald, Members.

DECISION

SHEK, Member: This case comes before the Public Employment Relations Board (PERB or Board) on appeal by Albert Chan (Chan) of a dismissal of his unfair practice charge. The charge alleged that the SEIU Local 790 (Local 790) violated the Meyers-Milias-Brown Act (MMBA)[1] by failing to seek arbitration of Chan's termination from employment with the City and County of Sacramento Recreation and Park Department (City). Chan alleged that this conduct constituted a violation of Local 790's duty of fair representation and brought an unfair practice charge under MMBA section 3509(b) and PERB Regulation 32604.[2]

The Board has reviewed the entire record in this case, including but not limited to the unfair practice charge, the first amended charge, and the warning and dismissal letters. Based upon this review, we affirm the dismissal of the charge.

[1]MMBA is codified at Government Code section 3500, et seq.

[2]PERB regulations are codified at California Code of Regulations, title 8, section 31001, et seq.

BACKGROUND

Chan was employed by the City as a Lifeguard/Swim Instructor until he was accused by a female swimming pool patron of sexual harassment (an accusation which he denied). On January 14, 2004, following a Skelly[3] hearing, the City Aquatics Manager determined to move forward with Chan's dismissal from employment. However, on that date, Chan requested and was granted a medical leave of absence.

After Chan had been on disability leave for over a year, the City scheduled a meeting with Chan and his lawyer to review the termination recommendation. At Chan's request, the City postponed the meeting twice, ultimately settling on a date of July 11, 2005. Chan failed to appear at the July 11, 2005 meeting or to exercise his option of responding in writing.

On July 14, 2005, the City issued a notice of dismissal terminating Chan's employment. Chan alleges that he picked up a copy of the notice of dismissal at the post office on August 1, 2005.

Chan alleges that he thereafter telephoned Local 790 to request that Local 790 seek arbitration of his termination according to the collective bargaining agreement (CBA) between Local 790 and the City, but that Local 790 did not return his telephone calls. In an August 30, 2005, letter, Chan requested that Local 790 take his case to arbitration. On October 7, 2005, Chan alleges that he went to the union's office and was informed that the deadline for requesting arbitration had passed.

Chan filed an unfair practice charge on March 29, 2006, alleging that Local 790 violated its duty of fair representation. The Board agent issued a warning letter on April 5, 2006, and dismissed the charge on July 6, 2006. The Board agent reasoned that it was "extremely likely" that the deadline for requesting arbitration had elapsed by the time Chan

[3]Skelly v. State Personnel Bd. (1975) 15 Cal.3d 194 [124 Cal.Rptr. 14] (Skellv).

asked the union to seek arbitration, and that therefore, the union's decision not to pursue arbitration was neither arbitrary nor devoid of rational basis.

On appeal, Chan alleges that the Board agent erred in stating that he was terminated in 2004, when, in fact, he was terminated in July 2005. Chan alleges that the CBA provides for the union to request arbitration over the termination of a unit member. Additionally, he alleges that he requested that Local 790 elevate his case to arbitration within approximately one month after his termination, but that Local 790 failed to do so.

DISCUSSION

The issue in this case is whether Local 790 breached the duty of fair representation. While the MMBA does not expressly impose a statutory duty of fair representation upon employee organizations, the courts have held that "unions owe a duty of fair representation to their members, and this requires them to refrain from representing their members arbitrarily, discriminatorily, or in bad faith." (Hussey v. Operating Engineers (1995) 35 Cal.App.4th 1213 [42 Cal.Rptr.2d 389] (Hussey).)

Case law indicates that the duty of fair representation is not breached by mere negligence and that a union is to be "accorded wide latitude in the representation of its members . .. absent a showing of arbitrary exercise of the union's power." (Hussey.) A union does not breach its duty of fair representation by declining to proceed or negligently forgetting to file a timely appeal of a grievance. (San Francisco Classroom Teachers Association, CTA/NEA (Bramell) (1984) PERB Decision No. 430 (Bramell).) In Bramell. the union was found to have violated its duty of fair representation because it promised to obtain an extension of time to file a grievance but inexplicably failed to do so. The Board has also held that a disagreement between the union and the grievant as to whether a grievance should proceed to

arbitration does not establish a breach of the duty of fair representation. (Service Employees International Union. Local 250 (Hessong) (2004) PERB Decision No. 1693-M (Hessong).)

The facts of this case, as alleged, do not establish a prima facie case of a breach of the duty of fair representation. Unlike the facts of Bramell, the unfair practice charge does not allege that Local 790 ever promised to request arbitration of Chan's termination. Additionally, under Bramell and Hessong, the allegations regarding Local 790's failure to return Chan's phone calls regarding the request for arbitration are not sufficient evidence that the union acted in a manner that was arbitrary, discriminatory, or in bad faith. The unfair practice charge did not allege the date(s) on which he made such a telephone call(s) to the union. The record does not establish whether Chan's case was even eligible for arbitration, as Chan and his lawyer failed to appear at the meeting scheduled for July 11, 2005 to review his termination. The record also does not establish that Chan requested the union to seek arbitration within the time limit for doing so.[4] The Board therefore finds that the unfair practice charge fails to state a prima facie case of a breach of the duty of fair representation.

ORDER

The unfair practice charge in Case No. SF-CO-128-M is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members McKeag and Neuwald joined in this Decision.

[4]The record does not the relevant CBA provisions, and we cannot determine the deadline for filing a request for arbitration. However, the record indicates that Chan did not pick up his notice of termination until two weeks after it was mailed, and telephoned the union some time thereafter.